SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 177

J. M. LEDBETTER, JR., ADMINISTRATOR C. T. A. OF THE ESTATE OF ROBERT L. STEELE, III, AND THE STATE OF NORTH CAROLINA AND THE CLERK OF THE SUPERIOR COURT OF BLADEN COUNTY, ex rel., AND FOR THE USE AND BENEFIT OF, J. M. LEDBETTER, JR., ADMINISTRATOR C. T. A. OF THE ESTATE OF ROBERT L. STEELE, III,

Petitioners,

v.

FARMERS BANK & TRUST COMPANY, A CORPORATION, AND FEDERAL RESERVE BANK OF RICHMOND, A CORPORATION,

Respondents.

SECOND PETITION FOR REHEARING

Statement of Matter Involved

In its opinion the Court below stated that if plaintiffs' motion for leave to amend comes under Rules 15(a) or 60(b), there was no abuse of discretion by the district court in refusing to allow plaintiffs to amend (R. 19, 142 F. 2d 147, 149). However, the district court bottomed its refusal to allow plaintiffs to amend on the failure of plaintiffs to allege anything additional in the proposed amendment on which planitiffs would be entitled to recover, and on the failure of the plaintiffs to make the motion within ten days (R. 13).

The denial of the motion was, therefore, made as a matter of law even though it was a matter in the discretion of the judge. It is here the conflict lies, for the Circuit Court of Appeals for the Fourth Circuit refused to review the ruling of the district judge because it was a matter that lies in his discretion, whereas the Circuit Court of Appeals for the Sixth Circuit in *Felton* v. *Spiro*, 78 F. 576, 24 C. C. A. 321, *Hernan* v. *American Bridge Company*, 167 F. 930, and *City of Corington* v. *Cincinnati N. & C. Railway Co.*, 71 F. 2d 117, held that where a district judge denies a motion on the ground that he has no discretion or fails to exercise his discretion, the ruling is reviewable.

The Question In Conflict Is Moot If the Proposed Amendment Do Not State a Valid Claim

However, the Court below in its opinion also stated that the proposed amendment does not state a valid claim (R. 19, 142 F. 2d 147, 149). Of course, if the Circuit Court of Appeals for the Fourth Circuit be correct in its holding that the proposed amendment does not state a valid claim, the question of whether or not the ruling of the district judge is reviewable is a moot one.

The Proposed Amendment Does State a Valid Claim

The proposed amendment alleged that the receiver failed to take insurance as the proximate result of instructions given him by the mortgagees (R. 11-12). It is well to bear in mind that the petitioners in the proposed amendment alleged that the mortgagees "instructed" the receiver not to obtain fire insurance until they advised him with what company to take it (R. 12). The word petitioners used was "instructed" instead of "advised" as the Circuit Court of Appeals stated (R. 19).

In *Donovan* v. *Laing, etc., Construction Syndicate* (1893), 1 Q. B. (Eng.) 629, *Lord Justice Bowen* said, "* * * If the

hirer [of a coach] actively interferes with the driving, and injury occurs to anyone, the hirer may be liable, not as a master, but as a procurer and cause of the wrongful act complained of." This language was quoted with approval by *Circuit Judge Taft* in *Byrne* v. *Kansas City, etc., R. Co.*, 61 Fed. 605, 610, 22 U. S. App. 220, 9 C. C. A. 666, 24 L. R. A. 693, 698, and in *Frerker* v. *Nickolson*, 41 Colo. 12, 92 P. 224, 14 Ann. Cas. 730, 731, 13 L. R. A. (N. S.) 1122, 1126. To like effect are *Burgess Brothers Company* v. *Stewart*, 112 Misc. 347, 184 N. Y. S. 199, affirmed, 194 App. Div. 913, 185 N. Y. S. 85, and *Adams* v. *Cook*, 91 Vt. 281, 100 A. 42. Counsel for petitioners have found no authorities contrary to this, and it is significant that the Court below cited none.

There would seem to be no conflict between the general law and the law of North Carolina on this point. As a matter of fact, the North Carolina cases go even further and hold that it is not necessary that the person be injured by the specific directions of the person interfering, but merely that he actually undertake general directions. *Dillon* v. *Winston-Salem*, 221 N. C. 512, 20 S.E. 2d 845; *Williams* v. *Blue*, 173 N. C. 452, 92 S.E. 270.

The Question In Conflict Is Moot If the Amendment Be Controlled by Rule 59(b)

If the district court properly denied petitioners' motion to amend because the motion was controlled by Rule 59(b), then the question in conflict between the Fourth Circuit Court of Appeals and the Sixth Circuit Court of Appeals is moot in the instant case, for the order of the district court was then properly affirmed on that ground.

Rule 59(b) provides that a motion for a new trial shall be served not later than ten days after the entry of the judgment. Of course, if a motion to amend a pleading after the action is dismissed for failure to state a claim on which relief can be granted be a motion for a new trial, then petitioners' motion was properly denied by the district court, and the question in conflict is moot.

The Motion to Amend Is Not Controlled by Rule 59(b)

However, a motion to amend in such circumstances is *not* a motion for a new trial.

It is well settled that, in construing an act, the court will adopt the definition of words that prevailed before the passage of the act. In *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106, 115, 84 L. ed. 110, 60 S. Ct. 1, *rehearing denied*, 308 U. S. 637, 84 L. ed. 529, 60 S. Ct. 258, this Court said: "* * * we adhere to the familiar rule that where words are employed in an act which had at the time a well-known meaning in the law, they are used in that sense unless the context requires the contrary."

A "new trial" has universally been defined as a new trial of an issue of fact. 39 *Am. Jur.* 33, New Trial, Sec. 2; *Wheeling & Lake Erie Ry. Co.* v. *Ritcher*, 131 Ohio St. 433, 3 N.E. 2d 408, 410; *Garden City Feeder Co.* v. *Commissioner of Internal Revenue* (8th C. C. A.), 75 F. 2d 804. In *Anderson* v. *Independent Order of Foresters*, 98 N. J. L. 648, 126 A. 631, 632, it was held that the action of the circuit court in vacating a default judgment is not the granting of a new trial within the meaning of the statute requiring applications for new trials to be made within thirty days after entry of the judgment. And *Associate Justice Miller* in a dissenting opinion in *Safeway Stores* v. *Coe*, 78 U. S. App. D. C. 19, 136 F. 2d 771, 776, ff., 148 A. L. R. 782, 787 ff., collects and comments upon numerous other authorities to the effect that a new trial is a new trial of an issue or issues of fact.

Thus, a motion for a new trial under Rule 59 is a motion for a new trial on an issue of fact; especially is this conclusion sustainable in view of the language of Rule 59(a): "Grounds. A new trial may be granted to all or any of the parties and *on all* or *part of the issues* (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions

at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States * * *." (Italics supplied.) The language "on all or part of the issues" implies that there shall have been a trial of issues of fact. And, as there had been no trial of fact in this case, the motion to amend comes more nearly within the classification of a motion to set aside or vacate a judgment. And, indeed, the Circuit Court of Appeals for the First Circuit, without deciding the question, stated that the plaintiff might move to amend under Rule 60 at any time within six months of a dismissal. *United States* v. *Newbury Manufacturing Company*, 123 F. 2d 453, 454-455.

The motion in this case could not even be a motion for a rehearing in the sense in which rehearing is used in appellate courts[4], for this Court has defined rehearing as follows:

"Ordinarily, a petition for rehearing is for the purpose of directing attention to matters said to have been overlooked or mistakenly conceived in the original decision, and thus invites a reconsideration upon the record upon which that decision rested." *Atchison, Topeka & Santa Fe R. Co.* v. *United States*, 284 U. S. 248, 259, 52 S. Ct. 146, 149, 76 L. ed. 273.

Thus it is apparent that the motion for leave to amend could not have properly been denied on the ground that it was not served within ten days, and for that reason the question in conflict is not moot.

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[4] Under Equity Rule 69, rehearings were granted "only upon such grounds as would authorize a new trial in an action at law." *Sheeler* v. *Alexander*, 211 Fed. 544, 547, quoted with approval in *Safeway Stores* v. *Coe*, 78 U. S. App. D. C. 19, 136 F. 2d, 771, 773, 148, A. L. R. 782, 784. Equity Rule 72 provided for correction of mistakes "without the form or *expense of a rehearing*." Since a rehearing in the Equity sense is expensive, it must necessarily be a rehearing of an issue of fact. It would seem, too, that since the power of an appellate court to grant rehearing is not derived from any statute but is inherent in it as a court of justice, the district court would likewise have such power. Indeed, it would seem strange to require a litigant to go to the expense of taking an appeal instead of allowing the district court to correct its own error. See *Bucy* v. *Nevada Construction Co.*, 9th C. C. A., 125 F. 2d 213, 216-217, where it was held that Rule 60 did not deprive the district courts of the power to correct manifest errors.

If the Motion In This Case Be Controlled by Rule 59(b), Certirorari Should Be Granted to Settle the Conflict Between the Decision In This Case and the Decision of the Circuit Court of Appeals for the First Circuit.

If this Court should decide that the motion in this case is controlled by Rule 59(b), then certiorari should be granted to resolve the conflict between the decision in this case and the statement in *U. S.* v. *Newbury Manufacturing Co.*, 123 F. 2d 453. In that case the Circuit Court of Appeals for the First Circuit stated that a motion for leave to amend after the action is dismissed for failure to state a claim on which relief can be granted may be made at any time within six months of the dismissal. If in this case the decision of the Circuit Court of Appeals for the Fourth Circuit be sustainable on the ground that the motion must be made within ten days, a conflict is immediately apparent.

Conclusion

It is earnestly contended that a conflict exists between the decision of the Circuit Court of Appeals for the Fourth Circuit and the decisions of the Circuit Court of Appeals for the Sixth Circuit in the cases cited above, that the question in conflict is not a moot one, and that this Court should grant the petition for writ of certiorari in order to resolve this conflict.

Prayer

Petitioners respectfully pray that the Court grant this petition for rehearing and the writ of certiorari prayed for in the petition therefor.

WHITEFORD S. BLAKENEY,
GEORGE S. STEELE,
Counsel for Petitioners.

CERTIFICATE OF COUNSEL

Counsel for petitioners respectfully certify that this petition for rehearing is filed in good faith and is not presented for delay.

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GEORGE S. STEELE,
Counsel for Petitioners.